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ABSTRACT

"State action" is a term used to describe claims arising under the due process clause of the Fourteenth Amendment and the Civil Rights Act for which a private party is seeking damages because the state has violated that party's civil rights. Cases are summarized illustrating the doctrine's evolution over the past century. The 1875 Civil Rights Act provided the public-private basis for judicial rulings for at least the next 60 years. The state action doctrine gradually underwent a period of expansion from the formal public-private dichotomy to a functional analysis, from the late 1940's to the late 1960's. The public function (public sphere) doctrine made its first appearance in 1946. The 1960's saw a proliferation of state action cases and the degree of state involvement was utilized as the standard for determining state action. A major contraction of the state action doctrine and a revival of the public-private sphere began in 1972 with the first of three decisions authored by Justice William Rehnquist called the "Rehnquist Trilogy." Private education institutions have remained relatively immune from Fourteenth Amendment restrictions at the Supreme Court level but have been held more accountable in lower court rulings. The state action doctrine, after 100 years of transition, remains a difficult legal tool for the courts to define and administer. (MLF)

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State Action and the Public Spheres Doctrines: Constitutional Inroads into the Private Sector

Steve W. Batson

Gifis defines "state action" as "a term used to describe claims arising under the due process clause of the fourteenth amendment and the Civil Rights Act for which a private party is seeking damages or other proper remedy because the state has violated that party's civil rights."[1] Charles Black calls this doctrine "the most important problem in American law"[2] and goes on to describe it as "a 'doctrine' without shape or line . . . a torchless search for a way out of a damp echoing cave . . . a conceptual disaster area."[3] David Stern comments that the one hundred year-old doctrine "operates as a healthy limitation on suits brought under the fourteenth amendment (but) . . . that the doctrine has not aged gracefully."[4]

Formal to Functional

How has this doctrine evolved over the past century and arrived in the 1980s with such mixed reviews? A thorough analysis of the "transfiguration" of this doctrine, as Leslie Goldstein[5] describes it, begins with the *Slaughterhouse Cases*[6] and the *Civil Rights Cases*.[7]

The *Slaughterhouse Cases*[8] viewed both the thirteenth amendment (prohibiting slavery and involuntary servitude)[9] and the fourteenth amendment (prohibiting state deprivation of life, liberty, or

1. S. Gifis, Law Dictionary 452 (2nd ed. 1984).
2. Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967).
3. *Id.* at 95.
4. Stern, *State Action and Chapter 766: Rendell-Baker and the Demise of the Public Function Doctrine*, 19 New Eng. 237 (1983).
5. Goldstein, *Death and Transfiguration of the State Action Doctrine — Moose Lodge v. Irvis to Runyon v. McCrary*, 4 Hastings Const. L.Q. 1 (1977).
6. 83 U.S. 36 (1872).
7. 109 U.S. 3 (1883).
8. 83 U.S. 36 (1872).
9. U.S. Const. amend. XIII, § 2.

EA 018 416

property without due process; nor denial of equal protection)[10] as limited primarily to blacks and "intended to prevent the hostile discrimination against the negro race so familiar in the states where he had been a slave."[11]

The famous *Civil Rights Cases*[12] extended the breadth of the fourteenth amendment, stating that the amendment "prohibits any state legislation which has the effect of denying to *any* race or class, or to *any* individual, the equal protection of the laws."[13] But Justice Bradley concluded that the private discrimination involved in refusing accommodations on the basis of race was not a badge of slavery or servitude. The Civil Rights Act was meant to counteract unconstitutional state action. According to Justice Bradley, "Civil rights ... cannot be impaired by the wrongful acts of individuals, unsupported by state authority."[14] This agency theory, asserting that the state could only act through its agents and instrumentalities, although quite limited in scope, provided the public-private basis for judicial rulings for at least the next sixty years. The agency theory required a formal governmental actor operating in this "public" sphere.[15] Various cases successfully applied this theory to administrative agencies, courts, municipalities, and universities.[16]

Interestingly, Justice Harlan's dissent in the *Civil Rights Cases*[17] foreshadowed a later expansion of the scope of state action with the "public responsibility" or "public sphere" doctrine.[18] Using the cases arising from the 1875 Civil Rights Act[19] for discussion, Harlan rhetorically asked what were the legal rights of blacks in respect to public conveyances, inns, and places of amusement. He then responded by concluding that a railroad corporation is a governmental agency, an innkeeper a quasi public employee, and an amusement park "not a matter purely of private concern."[20]

His philosphy, if not his words, were echoed in the public accom-

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10. U.S. Const. amend. XIV, § 1.
11. 83 U.S. 36, 37-38 (1872).
12. 109 U.S. 3 (1883).
13. *Id.* at 24 (emphasis added).
14. 109 U.S. at 17.
15. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 St. Louis U.L.J. 683, 687 (1984).
16. *E.g.*, Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907) (tax assessment); Twining v. New Jersey, 211 U.S. 78 (1908) (court decision); Lovell v. Griffin, 303 U.S. 444 (1938) (municipal ordinance); Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934) (rules of regents).
17. 109 U.S. at 26 (Harlan, J., dissenting).
18. Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J. Law & Educ. 171, 175 (1982).
19. 18 Stat. 335.
20. 109 U.S. at 42.

modations provisions of the 1964 Civil Rights Act,[21] although these provisions were based on the congressional power to regulate commerce rather than on fourteenth amendment legislation. In addition, as Goldstein notes, the Court in a 1971 case, *Griffin v. Breckenridge,*[22] endorsed a thirteenth amendment approach "that was almost word-for-word a recapitulation of the dissent of Justice Harlan in the *Civil Rights Cases.*"[23]

The state action doctrine gradually underwent a period of expansion, a transition from the formal public-private dichotomy to a functional analysis, from the late 1940s to the late 1960s, although the road to a broader interpretation had many detours. The public function (public sphere) doctrine made its first formative appearance in 1946 with *Marsh v. Alabama,*[24] a first and fourteenth amendments challenge by a Jehovah's Witness on a trespass conviction for distributing religious tracts on the premises of a company-owned town contrary to the wishes of the town's management. Disregarding the town's private status, Justice Black undertook a functional analysis, looking at what the town of Chickasaw actually was — a plot of land which the state had allowed to be used as a town. The Court held that: "Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to disbribute religious literature in a company town, its action cannot stand."[25]

State Involvement

While the functional reasoning of *Marsh* did not appear again in a court ruling until the early 1960s, state action expanded in a different manner in 1948 using the judicial enforcement theory[26] of the state involvement doctrine. In *Shelley v. Kraemer,*[27] the Court held that:

> Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes do not violate the fourteenth amendment; but it is violative of the equal protection clause of the fourteenth amendment for state courts to enforce them.[28]

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21. 42 U.S.C. § 2000a.
22. 403 U.S. 88 (1971).
23. Goldstein, *supra* note 5, at 11.
24. 326 U.S. 501 (1946).
25. *Id.* at 509.
26. Thigpen, *supra* note 18, at 190.
27. 334 U.S. 1 (1948).
28. *Id.* at 1.

Going beyond earlier decisions which used a formal approach to state action (i.e., that state judicial officers could not administer an unconstitutional standard), *Shelley* held that the structured power of state government cannot be utilized to enforce an unconstitutional norm, even where the norm is formulted by private contracts.[29] The judicial enforcement theory was extended slightly in a few subsequent rulings, but the Court had dropped citations to *Shelley* by the 1960s, finding other criteria for state action.

The 1960s saw a proliferation of state action cases with *Burton v. Wilmington Parking Authority*[30] heading the list and utilizing the degree of state involvement as the standard for determining state action. A black male was refused service at a restaurant located in an automobile parking garage publicly owned and operated by the Wilmington Parking Authority, and he sued on the grounds that such refusal violated the equal protection provisions of the fourteenth amendment. The Court commented, in a now famous and often cited statement, that developing a precise formula for determining state involvement was an "impossible task" and that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[31] State involvement included owning and maintaining the building, providing parking for customers, receiving income from the lease, sharing tax-exempt status, having official signs and state and national flags flown on the building, and owning any improvements made to the facility.

Justice Clark stated that "[T]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity."[32] It should be noted that Justice Harlan, in his dissent, stated that the Court should first seek a clarification of the ruling by the Delaware Supreme Court before reaching "issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent."[33] *Burton* was significant because of its promulgation of the "symbiotic relationship" theory and the implication that criteria of governmental involvement should be assessed in their cumulative impact.[34]

The public function doctrine from *Marsh* awoke from hibernation

29. Thigpen, *supra* note 18, at 191.
30. 365 U.S. 715 (1961).
31. *Id.* at 722.
32. 365 U.S. at 725.
33. *Id.* at 765 (Harlan, J. dissenting).
34. Phillips, *supra* note 15, at 697.

in 1966 with *Evans v. Newton*[35] and in 1968 with *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza.*[36] Both *Evans* and *Logan Valley* expressed the same concerns with private power and the state being implicated in equal protection denial as those expressed in *Marsh*. The courts could not appoint trustees for a racially segregated park or enjoin labor picketing in a privately owned shopping center without being responsible for denial of equal protection.

The late 1960s perhaps represent a peak for the public function doctrine with several subsequent decisions, in effect, reversing *Evans* and *Logan Valley*. The 1970 case *Evans v. Abney*[37] essentially reversed the decision of the earlier *Evans* case. *Lloyd Corporation v. Tanner*[38] involved refusal by the owners of a private shopping mall to allow Vietnam War protestors to distribute handbills on its premises, a case very similar to *Logan Valley*. The Court distinguished *Lloyd* from *Logan Valley* and held for the company, stating that the handbilling was not related to the mall's operation.[39] In a 1976 case, *Hudgens v. NLRB,*[40] Justice Stewart's opinion declared that "[T]he ultimate holding in *Lloyd* had amounted to a total rejection of the holding in *Logan Valley,*"[41] thereby dealing a deadly blow to *Logan Valley*. *Hudgens* was remanded to the court of appeals to be remanded to the National Labor Relations Board for consideration under NLRA statutory criteria rather than a state action approach.

The state involvement doctrine and the judicial enforcement theory received additional reinforcement in 1970 with *Reitman v. Mulkey,*[42] a California housing discrimination suit. The Court cited *Burton* and upheld the judgment of the California Supreme Court that "[T]he provision (Proposition 14)[43] would involve the State in private racial discriminations to an unconstitutional degree."[44]

Contraction and Dichotomy

A significant opinion authored by Justice William Rehnquist, a new member of the Court in 1972, began a major contraction of the state action doctrine and a revival of the public-private sphere doc-

35. 382 U.S. 296 (1966).
36. 391 U.S. 308 (1968).
37. 396 U.S. 435 (1970).
38. 407 U.S. 551 (1972).
39. *Id.* at 563-66.
40. 424 U.S. 507 (1976).
41. *Id.* at 518.
42. 387 U.S. 369 (1967).
43. Cal. Const. art. I, § 26.
44. *Id.* at 378-79.

trine. The first case in the "Rehnquist Trilogy"[45] was *Moose Lodge No. 107 v. Irvis*[46] in which the Court found no state action responsible for a private club's refusal to serve liquor to a black male. Rehnquist distinguished *Moose Lodge* from *Burton*, stating that this was a private club on private property, and Irvis was a guest at the lodge and had not applied for nor been denied membership.[47] Citing the *Civil Rights Cases* and quoting from *Shelley*, Rehnquist restated that this was "private conduct, however discriminatory or wrongful, against which that clause (the equal protection clause) erects no shield."[48] As Goldstein notes, the Court in *Moose Lodge* "accentuated the limits against the enforcement of the Pennsylvania Liquor Board regulation that commands private clubs to obey their own membership requirements."[49]

The second case in the trilogy, *Jackson v. Metropolitan Edison Company*,[50] is "perhaps the most significant single decision in the Burger Court's state action cutback."[51] In *Jackson*, Rehnquist introduced the "Jackson nexus test," rejected *Burton's* rationale of cumulative impact,[52] and further limited the public function doctrine to "powers traditionally exclusively reserved to the state."[53] Jackson sought damages and injunctive relief under 42 U.S.C. section 1983 for termination of her electrical service "before she had been afforded notice, a hearing, and an opportunity to pay any amounts found due."[54] Justice Rehnquist found no state action or symbiotic relationship despite the fact that termination of service for non-payment was a provision in the utility's general tariff approved by the public utility commission actually by lack of any commission action to disapprove it. The "Jackson nexus test" obviously required an extremely close relationship by the state not present here since the state had not directly considered this tariff provision nor ordered the termination of service.

Taking this authorization-compulsion distinction a bit further, Rehnquist found no state action in *Flagg Brothers, Inc. v. Brooks*[55] in which the Court rejected a due process challenge to a warehouse-

45. Rowe, *The Emerging Threshold Approach to State Action Determinations: Trying to Make Sense of Flagg Brothers, Inc. v. Brooks*, 69 Geo. L.J. 745, 748 (1981).
46. 407 U.S. 163 (1972).
47. *Id.* at 163.
48. 334 U.S. 1, 13 (1948).
49. Goldstein, *supra* note 5, at 18.
50. 419 U.S. 345 (1974).
51. Phillips, *supra* note 15, at 704.
52. 419 U.S. at 351.
53. *Id.* at 352.
54. *Id.* at 345.
55. 436 U.S. 149 (1978).

man's proposed sale of stored private goods pursuant to a provision of the New York Uniform Commercial Code. This case failed the "exclusivity" test[56] since the proposed sale was not the only means of resolution nor had the state granted Flagg Brothers a traditional sovereign prerogative. It is intersting to note Justice Marshall's dissenting comments that he was "troubled by the Court's cavalier treatment of the place of historical factors in the 'state action' inquiry ... and that such an issue plainly cannot be resolved in a historical vacuum."[57]

A creditor remedy case similar to *Flagg* was considered by the Court in 1982 with a decision that state action was present. In *Lugar v. Edmonson Oil Co., Inc.*,[58] a writ of attachment was issued by a state court clerk against property which the petitioner may have sold to avoid a debt. Justice White called for preservation of a private sphere by limiting federal law and federal judicial power. He also presented a two-part approach for determining "fair attribution" of a federal right deprivation by the state:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct proposed by the state or by a person for whom the state is responsible ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.[59]

In two 1982 cases, the Court, with opinions delivered by Justices Burger and Rehnquist, used the "nexus" and "exclusivity" tests from *Jackson*[60] to again reject state action claims. *Blum v. Yaretsky*[61] involved claims of due process deprivation by nursing homes when involuntarily transferring medicaid patients to lower levels of care or involuntarily discharging them. The Court reasoned that those decisions were made by administrators and physicians—"concededly private parties."[62]

In *Rendell-Baker v. Kohn*,[63] former teachers and a counselor at a nonprofit, privately-operated school for maladjusted high school students brought a civil rights action against the school for constitutional rights violations in connection with their discharge. Students

56. *Id.* at 160.
57. 436 U.S. at 168 (Marshall, J., dissenting).
58. 457 U.S. 922 (1982).
59. *Id.* at 937.
60. 419 U.S. 345 (1974).
61. 457 U.S. 991 (1982).
62. *Id.* at 999.
63. 457 U.S. 830 (1982).

were referred to the school by public school districts under Chapter 766 of the Massachusetts Act of 1972 with ninety to ninety-nine percent of the school's funding derived from municipal, state, and federal funds and subject to extensive regulation by the state. In the opinion delivered by Justice Burger, the Court ruled that the action failed for lack of state action. Using *Jackson's* exclusivity test, Burger stated "that a private entity performs a function which serves the public does not make its acts state action."[64] Justice Marshall criticized the ruling as a "return to empty formalism."[65]

A desire by the present Court to preserve a broad private sphere, coupled with the strong emphasis on nexus and exclusivity and the obvious lack of a clear and unified theory of state action, combine to give no future promise of a resurgence or expansion of this exciting inroad of constitutional rights into the private sphere. As Phillips notes, "the result has been a number of inordinately complex, fact-specific state action decisions . . . "[66] with a growing trend toward rather involved and often circuitous and hazy arguments to achieve a desired ruling. Private educational institutions have remained relatively immune from fourteenth amendment restrictions at the United States Supreme Court level but have been held more accountable in lower court rulings. The state action doctrine, after one hundred years of transition, remains a difficult legal tool for the courts to define and administer.

64. *Id.* at 838.
65. 457 U.S. 830, 843 (1982).
66. Phillips, *supra* note 15, at 720.